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IN THE
SUPREME COURT OF THE UNITED STATES

DAWSON COUNTY, MONTANA and PRAIRIE COUNTY, MONTANA,

Petitioners

VS.

MARY HAGEN, E. B. CLARK, MINNIE R. EVANS, UNITED STATES OF AMERICA, EDNA YALE, ALLEN W. YALE, RUBY YALE, RUTH PETTERSON, HANS PETTERSON, and SCOTTISH AMERICAN MORTGAGE COMPANY, LIMITED,

Respondents

OPPOSING BRIEF ON PETITION FOR WRIT OF CERTIORARI

STATEMENT

Pentitioners' statement is confusing and inaccurate.

The correct title of this action is:

Correct title.

THE UNITED STATES OF AMERICA,
Plaintiff,

VS.

PAUL T. MARKEY, et al,

Defendants.

(R. 2, R. 78):

The Facts.

The findings, conclusions and judgment of the District Court containing all of the facts are set forth in R. 142 to 157.

Condemnation suit.

The government sought to condemn 17 separate tracts in Dawson County, Montana and 7 tracts in Prairie County, Montana, all of which, excepting tract No. 1-12, were within the irrigation district known as Upper Glendive-Fallon Irrigation District a public corporation created on December 20, 1920 and never dissolved and the government joined as defendants all known bondholders of the district, (R. 142).

County Agrees thereto.

The only answer of either petitioner is that of Dawson County (R. 43) which "admits the allegations of plaintiff's complaint" and likewise no contest was made by the bondholders against the condemnation (R. 28).

Questions of Law only on Distribution under 258a 40 USCA.

As found by the district court no question arose in the case regarding the creation of the Irrigation District and the proceedings in regard thereto with the map thereon showing the pumping plant, canals and laterals and the two lifts, a fory-foot lift and a seventy-five foot lift were introduced in evidence. The district was established by the judgment of the state district court and the court authorized the issuance

used to purchase a coal mine and to construct a pumping plant and the canals and laterals of the district. The plans were approved by the Public Service Commission of Montana.

No question arose regarding the validity of the general taxes or the validity of the irrigation district assessments, all of which were merged and taxes were levied upon the lands in question, other than tract No. 1-12.

Lien of Bonds prevented government from buying from county.

The government did have negotiations with Dawson County to buy the lands in question but it was unable to convey satisfactory title and hence the condemnation proceedings followed, (R. 151). The answer of said county shows definitely such negotiations and the offer of the county, but the county could not sell and did not attempt to sell the rights of the bondholders, (R.43). In the answer of Dawson County commencing at R. 44, it is set forth that the lands in question were covered by tax deed for taxes "levied by the State of Montana, Dawson County, Montana, and school districts, and taxes levied by Upper Glendive-Fallon Irrigation District, a public corporation" and set forth as to each tract of land in the county involved the general taxes and the irrigation taxes, levied and assessed and all of same were included in amount upon which the tax deed was obtained by the county.

of the bonds and the funds obtained therefrom were

County admitted sale of lands must be subject to lien of bonds.

After the tax deed was obtained the county passed a resolution for the sale of the property (R. 52, 53) but expressly recited therein that the sale was to be:

> "subject to the lien of the unpaid balance of certain Bonds issued by the Upper Glendive-Fallon Irrigation District Jan. 1, 1923." and

the notice given on the attempted sale, recited:

> "and all of the above lands described as being in Township 13 are subject to the lien of the unpaid balance of certain bonds issued by the Upper Glendive-Fallon Irrigation District January 1, 1923."

The district court found all the bonds were dated and issued January 1, 1923, redeemable in 20 years with interest at 6% and were sold by the commissioners of the irrigation district and attached to each bond was the certificate of the Public Service Commission of the State that the bond was legally issued and each bond was registered with the county treasurer and negotiated for cash in good faith to innocent holders, (R. 148, 149).

The tax deed in Dawson County for the lands in the irrigation district was taken on December 11, 1939, (R. 150).

Counties have been paid all general taxes.

Pending condemnation and after deposit Dawson County petitioned for and obtained payment of all general taxes claimed by it against the lands (R.67)

in sum of $10,628.57 which were due at time tax deed was taken and such order recited the irrigation assessments then delinquent and unpaid amounted to $41,662.98.

The judgment of condemnation followed the government complaint, (R. 78, 82) and the award of commissioners, (R. 69).

There then remained only the payment of the balance of the money on deposit, which represented the land, to those entited thereto and as the court found to be just and equitable under Section 258a, U. S. C. A.

The Trial Judge entered judgment based on findings to which no exceptions were made, (R.142 to 157).

Counties over-paid on deposit under 258a U. S. C. A.

On Tract No. 494-8, 494-11 and 494-13 Dawson County was over-paid $3,315.06 and Prairie County was overpaid on Tract No. 511-6 $327.86, more than the general taxes and the order of partial distribution made on July 11, 1944 (R. 67) was a mistake and was corrected by the final judgment (R. 147, 156). But the Circuit Court of Appeals modified the judgment by eliminating any requirements that the government repay that amount or that the counties return the over payment.

The District Court changed the boundaries of the Irrigation District and excluded Tract No. 1-27 and Tract 1-47 and 1-53 and also denied the bondholders appearing attorneys fees to be paid by all bondholders pro-rata.

A cross-appeal was taken to the Circuit Court on the last items but judgment was affirmed thereon without express decision.

The only question now presented is whether the counties can take all the remaining money on deposit and exclude all rights of the bondholders.

The bondholders appearing are Mary Hagen, E. B. Clark, and Minnie R. Evans on their own behalf and on behalf of all the bondholders of the Irrigation District.

It will be noted Prairie County has presented no pleading or record other than it joined in the notice of appeal given by Dawson County, (R. 157).

ARGUMENT

QUESTION INVOLVED

Summary of Petitioners theory.

Petitioners claim the counties could take tax deeds to the lands for the amount of general taxes and irrigation taxes levied by Upper Glendive-Fallon Irrigation District, a public corporation, and then exclude the district and the bondholders from any interest in the lands or the proceeds on sale thereof.

Respondents contention.

On the other hand, the bondholders contend that the statutory law of the State of Montana, hereafter cited and controlling, adequately creates and protects the lien of the bonds and such rights in confirmation of the statutes are guaranteed by the decisions of the highest court of Montana without conflict.

No Federal question or conflict.

Here there is no federal question involved and the decision of the Circuit Court is not in conflict with the decision of another Circuit Court and the decisions rendered by the Circuit Court of Appeals and by the District Court do not decide any important question of local law in any way in conflict with other applicable local decisions and there is no special or important reason that this Supreme Court should take jurisdiction.

This is a condemnation proceeding and the judgment in condemnation (R. 78) stands without appeal.

Montana statutes.

The Montana Law on Irrigation Districts is found in the Revised Codes of Montana, 1947, Sections 89-1201 to 89-2128, which are the same as Sections 7166 to 7264.18 of the Revised Codes of 1935 and practically the same as Sections 7166 to 7264 of the Revised Codes of 1921 in force when the bonds were issued. The judgment creating the district was entered by the state district court on December 2, 1920.

Section 89-1204, 1947 Code, makes the order creating the district conclusive unless appeal be taken in 60 days, and the district so established thereby became a public corporation for the promotion of the public welfare.

The next step was to provide for irrigation by construction of an irrigation system which required funds obtainable only through sale of the bonds which

in this case were issued by the commissioners of the irrigation district and confirmed by judgment of the district court following 89-1704 of the 1947 Code, and again the statute provides that such judgment shall be forever conclusive upon all the world as to the validity of such bonds.

The list of the bondholders (R. 41, 42) shows the bonds were sold to the general public, banks and estates, over a wide area and the petitioners admit, page 5 of their brief, that the principal of all bonds remain unpaid and interest since January 1, 1928.

(Bonds a Lien)

Section 89-1706, 1947 Code, which is the same as when the bonds were issued, expressly provides that all bonds:

> "shall be a lien upon all the lands originally or at any time included in the district * * * and said special tax or assessment, shall constitute a first and prior lien on the land against which levied, to the same extent and with like force and effect as taxes levied for state and county purposes."

Sections 89-1801 to 89-1832 of 1947 Code provide for the levy and collection of irrigation district taxes and assessments, and Section 89-1801 reads in part: "all bonds and the interest thereon *** shall be paid by revenue derived from a special tax or assessment levied as hereinafter provided upon all the lands included in the district" and the statute made it the duty of the district commissioners to make an annual levy and collection of a special tax or assessment upon all the lands in the district sufficient to pay the interest

and principal of the bonds and Sections 89-1811 and 89-1812 made it the duty of the county treasurer to collect such taxes and assessments in the same manner and at the same time as county and state taxes and he was made the custodian of all such funds. Section 89-1815 provides that sales for delinquent taxes or asessments of the district shall be made in the same manner as for state and county taxes. And Section 84-4108 of 1947 Code makes it the duty of the county treasurer of each county in which any irrigation district is located to collect all taxes and assessments of the district. Following the general rule the process of collecting is to sell the land and issue tax certificates of sale (84-4124) and a tax deed, Section 84-4157.

Section 89-1816 requires whenever any lands within an irrigation district are sold for delinquent taxes and include such taxes and assessments for the district the county treasurer must place to the credit of the funds of the irrigation district out of the proceeds of sale the total tax or assessment of the district with the interest and penalty and further that:

> "whenever any such lands are struck off at such sale to the county wherein the same are situate, pursuant to the provisions of section 84-4124, the county treasurer of such county must, upon the issuance of the certificate of tax sale to said county, issue to said irrigation district, and in its corporate name, a debenture certificate for the amount of taxes and assessments due to said irrigation district from said lands and premises, inclusive of the interest and penalty thereon, which certificate shall be evidence of and conclusive of

> the interest and claim of said irrigation district in, to, against, and upon the lands and premises so struck off to said county at such tax sale, and from and after the issuance of said certificate, the sum named therein and the taxes and assessments of said district evidenced thereby shall bear interest at the rate of one per centum per month from the date of said certificate until redeemed in the manner provided by law for the redemption of the lands sold for delinquent state and county taxes, or until paid from the proceeds of the sale of the lands and premises described therein."

Attention is also called to the fact that

"Whenever property sold to the county *** is redeemed *** the moneys received on account of said redemption" must be distributed to the various funds according to the levy, (Section 84-4189, 1947 Code) and in irrigation districts the county treasurer is specifically directed to apply such redemption money to the assessments or debenture certificates, Sections 89-1816 and 89-1818.

Under Section 89-1819 when such lands of the irrigation district so sold for taxes are not redeemed within the time provided by section 84-4132, it was made the duty of the board of county commissioners within three months thereafter to sell such lands and out of the proceeds of sale to pay the taxes and assessments due the irrigation district and covered by the aforesaid certificates and when the land was struck off to the county like certificates were issued and paid from the proceeds of the sale of said lands (Section 89-1820).

Likewise under the general tax law upon the sale by the county of lands acquired for delinquent taxes the proceeds shall be applied to the funds according to the levy or apportioned according to aggregate levy. (see Section 84-4195).

Here, the district had never been dissolved and the duty of the district commissioners continued to make levy of taxes to pay the interest and principal of the bonds to protect the lien thereof and the legislature of Montana in order to further protect such irrigation bonds provided:

> "Section 84-4170 (2215.9) Effect of deed. The deed hereafter issued under this or any other law of this state shall convey to the grantee the absolute title to the lands described therein as of the date of the expiration of the period of redemption, free of all encumbrances and clear of any and all claims of said defendants to said action except the lien for taxes which may have attached subsequent to the sale and the lien of any special local improvement, irrigation and drainage assessment levied against the property payable after the execution of said deed."

Under Section 89-1813 the county commissioners of the county have the duty to levy irrigation taxes and assessments for the protection of the bondholders if the district commissioners fail to do so.

Hence, under the basic law of Montana the irrigation bonds are established as liens on all lands within the district and the county as well as the district commissioners must not only provide a levy but must also collect the taxes and when collected must be used

to pay the interest and principal of the bonds and when the real estate is sold for delinquent taxes or assessments certificates thereon must be issued and when the county acquires tax title the lands must be sold and the proceeds of sale applied to such taxes and assessments of the district.

Under no possible theory could the county escape making levy of the irrigation assessments or fail to protect same by sale of the lands and application of the proceeds and it is difficult to understand how anyone could conceive that the county could by acquiring a tax deed defeat the assessments for which the tax was levied and which was the foundation for the tax deed!

The law imposes a mandatory duty upon the county for the protection of the bondholders which cannot be avoided.

It will be noted that the tax deeds to Dawson County were issued December 11, 1939 as to the lands in question and so found by the District Court, (R. 148, 97). The last amendment to Section 84-4170 was enacted prior to such deeds by Chapter 63, Laws of 1937.

Under that law the legislature made the subsequent assessments for irrigation a lien on the lands held by the county under tax deed and there was no way for the government to acquire title and exclude the liens of the bonds except by condemnation as was done.

Montana decisions regarding our irrigation law.

State ex rel. Mallott v. Board of County Com-

missioners 89 Mont. 37, 296 Pac. 1; and State ex rel. Malott V. Cascade County, 94 Montana 394, 22 Pac. (2d) 811, establish, the general rule that the law in force when bonds are issued become a part of the contract of the bondholders based on the rule that no state may pass any law impairing the obligation of contracts.

Petitioners brief is largely based upon a criticism of the case reported in 89 Montana 37, above cited but the court will find that the case has been subsequently approved by Montana Supreme Court in many, many cases.

The county is prohibited from claiming that it did not perform the official duty imposed by law. That is the statutory rule, 93-1301-7, subdivisions 15 and 33. In State ex Rel. Wolff, v. Geurkink 111 Mont. 417, 109 Pac. (2d) 1094, it was held that where the duty is plain and fixed by statute the performance thereof becomes a ministerial act and the officers must perform same without inquiry into the facts and hence in this case under Section 89-1816 the county treasurer was obligated by law to issue debenture certificates to protect the irrigation taxes and assessments and it was held in 94 Mont. 394 above cited that:

> "When the lands are struck off to the county and the debenture certificates are issued as required by the law, the county occupies the position of a trustee for the interested parties, including, of course, the bondholders* * * the county, as trustee cannot lawfully do anything adverse to the rights of the bondholders, beneficiaries under the

> trust. After issuing the debenture certificate it can perform but two acts (or related acts) with respect to the lands: (1) Receive money paid upon redemption and distribute the same; (2) obtain a deed to the lands, sell the same, and distribute the money received upon sale."

In that case the court held that the bondholders were not required to redeem from tax sale and further said:

> "But in view of the law it is the duty of the county commissioners to apply for tax deeds to enable the county to sell the land and to apply the proceeds as directed by law. (State ex rel. Malott v. Board of County Commrs., 86 Mont. 595, 285 Pac. 932.) This is but one of the puzzles which may be expected to appear from time to time in the operation of Montana's maladroit irrigation law. However, the rationale of the law compels the conclusion that, when irrigation district lands are struck off to the county and under statutory direction debenture certificates have been issued therefor, the county becomes a trustee and never discharges its trust until the lands are redeemed from sale, or, if not, until it sells the lands and distributes the proceeds agreeable to equity."

In the case 89 Mont. 37, the court also approved the rule that when the county acquired the tax deed on account of delinquent taxes and irrigation district assessments it takes and holds title as trustee and the moneys derived from the sale of land are trust funds in which the bondholders are interested. That statement merely followed the expressed provisions of the statute. Subsequent to the decision in that case the legislature enacted or amended Section 84-4170 to protect subsequent assessments for the benefit of the bondholders.

It will be noticed that in the case of Rosebud Land & Improvement Co. V. Carterville Irrigation District 102 Mont. 465, 58 Pac. (2d) 765, a direct attack was made upon the Malott Case 89 Mont. 37 and after a review of all of the cases it was reaffirmed. That case was decided June 15, 1936 and prior to the enactment of Chapter 63 of the Laws of 1937 approved February 25, 1937 which protected subsequent irrigation assessments.

The first Malott Case was approved in Toole County Irr. Dist. v. State, 104 Mont. 420, 67 Pac. (2d) 989 where the court reviewed our irrigation law.

In Krueger V. Morris 110 Mont. 559, 107 Pac. (2d) 142 court again approved the first Malott case and held that the irrigation bonds "must all be regarded as valid, and we must also treat the bonds as constituting liens upon the entire property of the district".

Here there is no claim on the part of the bondholders that the counties are not entitled to payment of the general taxes which has been done but in view of the fact that the U. S. Government in condemnation has made all the bondholders parties defendant of necessity they must protect the liens of their bonds upon the lands and upon the compensation paid therefor, as otherwise if the bondholders should be compelled to sue the counties for an accounting or apportionment, the counties would plead res adjudicata and claim the bondholders were barred by the judgment in this action.

The Malott case was also approved in Toole County Irr. Dist. v. Moody, 125 F. (2d) 498 where the Ninth Circuit Court of Appeals construed Montana Irrigation law.

The trustee rule adopted in the Malott case was also followed in State ex rel. v. Rorabeck, 111 Mont. 320, 108 Pac. (2d) 601, the court said:

> "The principal and interest on the bonds were payable out of a particular fund exclusively, of which the county treasurer was custodian (sec. 7213, 7232., Rev. Codes 1921). The officers of the irrigation district who must provide for the levy and collection of a tax sufficient to meet the interest and principal, and the county treasurer who is made the custodian of the funds of the district, stand in the relation of trustees for the bondholders of the dirtrict."

The trustee or agency doctrine of the county is applied generally in regard to tax funds.

In the case of State ex rel. City of Wolf Point v. McFarlan 78 Mont. 156, 252 Pac. 805, decided prior to the first Malott case, the county treasurer sought to avoid payment to the city on taxes levied by the city. There the statute required the County Treasurer to collect the taxes levied by the city at the same time as state and county taxes and the court said:

> "In collecting city taxes the county treasurer does so as agent of the city. Nowhere, so far as we are aware, is there any provision for his remuneration for his services in collecting taxes, interest and penalties due the city. Nor need there be. He is a public officer, paid by the public, and there can be no doubt of the power of the legislature to include in his duties that of collecting and

paying over to a city in his county taxes caused to be levied in pursuance of law by the city authorities."

In that case the rule was applied to special improvement assessments and it was held that neither the county or the treasurer had any right to retain taxes for the city or for special improvement assessments.

A similar question arose in School District No. 12 v. Pondera County, 89 Mont. 342, 297 Pac. 498 where the question at issue was whether the school district was entitled to its pro rata share of interest and penalties paid on delinquent taxes and following the general statute the court held that the law required that the funds be pro rated according to the levy and although the money there was not paid on redemption all of the moneys received on sale of the land by the county had to be pro rated and that the county treasurer was merely acting for the school district and the funds "in the hands of the treasurer were trust funds".

Applying the same theory in another case entitled State ex Rel. Malott v. Board of County Commissioners 86 Mont. 595, 285 Pac. 932, which was an action requiring the county officials to apply for a tax deed in favor of the county to enforce the special assessments in an irrigation district and the court reviewed the general tax laws and the special laws in regard to irrigation districts especially where the county had become the purchaser of the lands, and held that when

a public body or officer has been clothed by statute with power which concerns the rights of third persons no mere discretion was involved but there was imposed a positive and absolute duty and the following language in the decision is appropriate to this case:

> "The sovereignty of the state of Montana for public welfare has authorized the organization of irrigation districts in the state in aid of agricultural development; it has given recognition of them as municipal corporations, clothed them with authority to issue and sell bonds upon the faith and credit of the district for the purpose of obtaining requisite financial assistance, and assured investors in such bonds of their payment through the machinery of the law. Admittedly, the irrigation district has had the use and benefit of the money obtained on sale of the bonds for its purposes, and to now permit the board of county commissioners to frustrate their payment from the lands embraced in the district upon technical grounds, or because of alleged discretion vested in it, would work a manifest fraud and injustice upon innocent parties who have honestly and fairly parted with their money in reliance upon the faith and credit of the irrigation district and the protection afforded by the laws of the state. Public municipalities should be held to the strictest accountability in payment of their obligations according to law, so as not to reflect discredit upon them or the state."

Dictum

In view of the statutes and the many decisions cited which announce the rule governing without conflict, it is absurd to discuss the alleged dictum in the Malott case, which consumes so much of petitioners brief; (pages 14 to 20).

Condemnation—Not Suit to Quiet Title.

Petitioners next seek to repudiate the condemnation proceedings and assert that the government brought action to quiet title, which is a denial of the complaint in condemnation (R. 2), agreed to in its answer by the county, (R. 43), and the county can not now repudiate the judgment in condemnation (R. 78) nor the findings, conclusions and judgment of the district Court (R. 142 to 157) from which petitioners appealed.

The eminent domain proceedings did not change the status of the county and the bondholders as to the lands involved. All property is subject to that power, 29 C. J. S. 852.

It is an involuntary sale for which full compensation is paid.

The government obtained title to the land in fee simple absolute and the right to compensation vested in the persons entitled thereto and the statute reads:

> "The Court shall have power to make such orders in respect of incumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable."

(40 U. S. C. A. Sec. 258a.)

The law allows market value fairly determined and no appeal having been taken from the award it conclusively stands as perfect equivalent in money for the lands. In State v. Lee, 103 Mont. 482, 63 Pac. (2d) 135, the court held the market value is the price that

in all probability would result from fair negotiations where the seller is willing to sell and the buyer desires to buy.

When the government commenced its condemnation the county had proceeded under Sections 89-1816 and 89-1817 and no redemption had been made and it was then the duty of the county to sell the lands as directed by Section 89-1819 and such statutes fully protect the taxes and assessments of the district for the benefit of the bondholders.

While section 89-1816 and 89-1819 both refer to section 2235 of the code, as to disposition of proceeds and sale of lands, it will be noted section 2235 has been amended and is now section 84-4195 which provides that upon sale of the property of lands acquired by the county under tax deed the proceeds shall be applied to each tax fund for benefit of the taxes and assessments as would have been done if the lands had been redeemed and the taxes and assessments paid.

It must be kept in mind that the law of Montana provides only one method of collecting the taxes and irrigation assessments and only one tax deed into which is merged all taxes and assessments levied and, where the lands are not purchased by third persons, the county automatically becomes the purchaser and holds tax title for the benefit of the public divisions according to the taxes and assessments levied. Here the lien of the bondholders continued until the bonds were paid in principal and interest and to the extent

of the compensation remaining after payment of general taxes the Federal District Court satisfied such liens under Section 258a.

The position here of the county, in that respect, was absolutely no different than if the county had sold the lands under Section 84-4190 to 84-4195.

Tax deeds here did not destroy bondholders' liens.

Finally, petitioners contend the counties owned aboslute title to the lands involved under the tax deeds and it is claimed the tax deeds extinguished the liens of the bondholders.

Such contention, if upheld would, repudiate and set at naught the clear statutory provisions outlined and the existing Montana law governing sale of county tax deed lands and apportionment of proceeds of sale and also rejects the positive rules of law adopted by the Supreme Court of Montana in the decisions cited.

If an individual should buy the lands from the county the provisions of Section 84-4195 and Sections 89-1816 to 89-1819 would apply and the proceeds of sale would be apportioned as the law directs. However, it must be observed that under the present law upon the issuance of the tax deed, even in the hands of the county, the lands become subject to irrigation assessments subsequently levied. In that respect the law has been changed since the decision in the Malott case, 89 Mont. 37. If petitioners had observed the ruling in the Malott case in 94 Mont. 394 at p. 403, the distinction between the individual buying and the county buy-

ing would have been apparent, as it was said:

> "It is argued that Mr. Thelen could have purchased the property when it was offered at tax sale, and, barring redemption, he could obtain a deed for the property, which would obviate the lien of the bonds. This is true, but an individual dealing at arm's length in purchasing property at a tax sale is in a different position from that of a governmental agency operating under statutory direction as a trustee. Had Thelen purchased the property at a tax sale, no debenture certificate would have been issued."

Petitioners have cited State ex Rel. City of Billings, v. Osten 91 Mont. 76, 5 Pac. (2d) 562 on theory that the county of Dawson **was not** bound by or affected by subsequent legislation, such as 84-4170 particularly as to assessments subsequent to tax deed to protect lien of bondholders and 84-4195 as to apportionment of proceeds of sale of tax deed lands for benefit of assessment levies made also for protection of the bondholders.

However, that case clearly makes the distinction between individual purchasers and government agencies, such as the county, and at page 81 of 91 Montana report in that case the court reaffirms the general rule that the tax deed is to be determined by the statutes in force when the sale was made and not by statutes subsequently enacted,

> "for, **EXCEPT AS TO GOVERNMENT AGENCIES**, the sale of land for delinquent taxes constitutes a contract" etc.

On page 82 of the same report, the court said:

> "Nor do we overlook the possibility that the **title of the county, a government agency, may be affected by subsequent legislation;"**
> (emphasis added)

The subsequent legislation is unimportant here because at the time of the issue of the bonds and ever since the liens thereof were fully protected by Sections 89-1816 to 89-1819 of 1947 Code.

Counties are pure creatures of the law.

In Franzke v. Fergus County 76 Mont 150, (at p. 154), 245 Pac. 962, the court said:

> "A county is merely a subdivision of the state for governmental purposes, and as such is subject to legislative regulation and control, except to the extent that the Constitution has restricted the law-making body. Within those limitations the legislature may circumscribe or extend the powers to be exercised by a county as it sees fit. *** and since our Constitution has not limited the authority of the legislature to regulate or control the disposition of county property, the right of the legislature to say that such property may be sold only under the restrictions and in the manner indicated by the statutes cannot be questioned;"

CROSS-ASSIGNMENT OF ERRORS

If this Supreme Court should grant the Writ which we oppose, we then respectfully submit, the entire case should be considered.

In the bondholders' Cross Appeal to the Ninth Circuit Court of Appeals, it was contended the District Court erred in attempting to re-establish the boundaries of the irrigation district to exclude Tracts 1-27

and 1-47 and 1-53 which deprived the bondholders of $1183.00.

It was also contended the fees and expenses should be pro rated among all bondholders as they share alike in the distribution pro-rata. That was denied, and we claim the court erred. The Circuit Court of Appeals affirmed the judgment without comment thereon.

Modification of judgment by Circuit Court of Appeals.

The District Court considered an over-payment had been made to the counties in excess of the award and to the loss of the bondholders as set forth in Finding of Fact No. 5, (R. 147). The District Court recognized that a mistake had been made in the partial distribution through its order of July 11, 1944, (R. 67) due to the fact the award of the commissioners was not made until September 29, 1945, (R. 77) and final judgment in condemnation not until Dec. 5th, 1945, (R. 90.)

The District Court followed Section 258a in that respect and should not have been put in error. That modification cost the bondholders $3642.92 besides interest.

The bondholders did not consider and do not now consider the case involves any special or important reason for the Writ of Certiorari but we contend, if granted, then the entire case should be considered and all errors reviewed.

CONCLUSION.

We have endeavored to answer petitioners brief,

and, while both the District Court and the Circuit Court of Appeals have reduced the amounts we contend are due the bondholders, the courts have not decided any important question of local law in any way in conflict with the governing statutes or applicable local decisions. This is just an ordinary suit in condemnation, wherein the counties have unjustly profited at a loss to the bondholders.

The bondholders claim Dawson County did not sell the lands to the U. S. Government but if the sale had in fact been made by the county to the government, as now claimed by petitioners, the same apportionment of proceeds of sale would be necessary under Section 84-4195 and 89-1816 to 89-1819 of 1947 Code.

The only hope or chance of the Counties to defeat the liens of the bondholders is to have this Court hold the counties are entitled to all of the compensation and that the bondholders are entitled to none thereof, as otherwise under the statutory provisions cited the counties must make apportionment of proceeds.

Insofar as the United States Supreme Court is concerned, it would seem unimportant whether distribution of sale proceeds be made by the condemnation court or by the state court.

However, under the condemnation law, here involved, the Federal District Court has the exclusive right and duty to make distribution, the statute directs:

"The court shall have power to make such orders

in respect of encumbrances, **liens**, rents, **taxes, assessments,** insurance, and other charges, if any, as shall be just and equitable." (Sec. 258a, 40 U. S. C. A.) (emphasis added)

The compensation is directed to be paid on application of the parties in interest on account of the just compensation.

(See United States of America v. Miller, 317 US 369, 87 L ed, 63 S. Ct. 276, 147 ALR 55)

Respectfully submitted,

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